

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>YEN PHAM</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 248,884
	)	
<b>IBP, INC.</b>	)	
Self Insured Respondent	)	

**ORDER**

Claimant requested review of the June 30, 2003 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on December 16, 2003.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found the claimant sustained a 9.45 percent functional impairment to her upper left extremity as a result of her July 20, 1998 accident. The ALJ denied any further permanency or work disability benefits as he concluded there was "no evidence that claimant's symptoms in her right upper extremity occurred simultaneously with her left upper extremity nor is there evidence that claimant's work activities were responsible for her problems in the right upper extremity or other parts of her body."<sup>1</sup>

The claimant requests review of this decision arguing the ALJ erred in disregarding Dr. Lynn Ketchum's opinions, the court appointed physician who concluded she had sustained a 12 percent whole body impairment. Claimant further argues that she was entitled to a substantial work disability as she has not returned to work and is unable to

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<sup>1</sup> Award at 4.

perform most if not all of the tasks she has performed since she immigrated from Vietnam to the United States.

Respondent contends claimant has failed to satisfy her burden of proof that she was, more likely than not, injured while working. Even if she met that burden, respondent maintains claimant is entitled to, at best, the upper extremity rating awarded by the ALJ and is not entitled to a whole body rating or work disability benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent on the production line trimming meat. On July 20, 1998, claimant reported to respondent that she was experiencing left elbow pain. Respondent provided conservative treatment with Dr. Hutchinson. Respondent assigned claimant to light-duty jobs during this period, including sharpening knives, "cut and hook" and "stir fry." Eventually, she was assigned to watch a conveyor belt and clean it as needed. At one point, while she was only directed to watch the belt and notify another to wipe it down, apparently in April 1999, claimant reported her right elbow was hurting. How or why her right upper extremity came to hurt is unknown. The job of "belt watching" involves standing and watching the conveyor belt. According to claimant, she was unable to do the belt watching job because her body is tired.<sup>2</sup>

Claimant was referred to Dr. Mark Melhorn and he diagnosed bilateral carpal tunnel syndrome and lateral epicondylitis. He performed a carpal tunnel release and a tendon release on each of claimant's hands and elbows. Dr. Melhorn was not asked how it was that claimant's job activities caused or gave rise to her right elbow or hand problems given her change in job duties after June 20, 1998.

When claimant returned to work, she went back to the belt wiping job. When she went back to see Dr. Melhorn, he noted her symptoms are markedly "disproportional to the clinical examination."<sup>3</sup> According to claimant, the surgeries did not relieve any of her symptoms and in fact, she continues to have diffuse complaints of pain in her neck, shoulders and throughout her body. Claimant was referred to Dr. Vito J. Carabetta for an evaluation although the results of that visit are unknown and not contained within the record.

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<sup>2</sup> R.H. Trans. (Dec. 15, 2000) at 14.

<sup>3</sup> Melhorn Depo., Ex. 2.

Dr. Melhorn saw claimant again in March 2000 and issued a 9.45 percent functional impairment rating to each upper extremity which yields a combined rating of 10.4 percent to the body as a whole. At his deposition, there was some discussion about whether, based upon a set of hypothetical assumptions including normal or near normal post-surgery EMG findings, his rating would be less. Dr. Melhorn then suggested the rating should be 4.6 percent to each extremity. Nonetheless, he recommended she return to medium work with a 50-pound maximum lift, carry and frequent at 25 pounds along with task rotation.

Once claimant returned to work in early 2000, she was assigned to various light duties. She would frequently leave her job early, working up to 30 hours per week. When she would leave, she was required to sign an acknowledgment that work was available within her restrictions but that she elected, on her own, to leave work.

Claimant was then referred to Dr. Jeffrey MacMillan in August 2000 who noted claimant was performing light-duty jobs and tolerating those activities. Dr. MacMillan testified that all the tests he conducted on claimant yielded normal results and he had no explanation for her diffuse complaints of pain in both upper extremities, shoulders, neck and even into her lower extremities. He concluded she had not suffered from any sort of repetitive use injury because immediately upon reporting her left arm pain she was moved to another light-duty job, yet her complaints continued. Dr. MacMillan provided her with medications that, in his experience, provide relief to most if not all of his patients. In this instance, claimant reported no improvement in spite of a series of injections and medications. In spite of this, claimant continued to complain of pain.

On October 25, 2000, Dr. MacMillan released her at maximum medical improvement. At his deposition, the doctor testified it was his opinion that claimant had suffered no work-related injury and was not entitled to anything more than a 0 percent functional impairment under the *AMA Guides*<sup>4</sup>. He also testified there was no anatomical basis to restrict her work duties in any manner.<sup>5</sup> When asked by respondent, Dr. MacMillan approved some of the jobs respondent offered claimant in an attempt to get her back to work, including "picking fat", "bagging rib fingers" and "80/20" indicating she was able to do those jobs.

Claimant was also seen by various other physicians during the course of this claim, some of whom issued impairment ratings. Dr. Daniel D. Zimmerman who assessed a 23

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<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>5</sup> MacMillan Depo. at 12.

percent to the body as a whole solely for the upper extremity complaints.<sup>6</sup> Although he assessed a functional impairment, it appears that Dr. Zimmerman gave no serious consideration to precisely how the right upper extremity was involved in claimant's work. He notes he reviewed Dr. Carabetta's report from December 23, 1999, which reveals claimant reported diffuse aching in both upper extremities. These complaints are nearly 18 months after claimant's first complaint of left elbow pain and while she was on light-duty performing a "belt watching" job.

At the regular hearing, the ALJ concluded claimant should be evaluated by an independent medical examiner so he assigned Dr. Lynn D. Ketchum to conduct an examination. Dr. Ketchum saw claimant on February 14, 2001, and concluded claimant required additional treatment for her bilateral arm and shoulder complaints. He recommended some conservative treatment and provided injections to her shoulders and elbows. Dr. Ketchum saw claimant again on June 24, 2002. He assigned a 10 percent to each upper extremity and suggested she should at least try the "picking fat" job offered by respondent.<sup>7</sup> There is no testimony from Dr. Ketchum relative to how her right upper extremity complaints which began while she was performing the "belt watching" job was related to her left elbow complaints that began in July 1998.

Claimant was also seen by Dr. Michael E. Ryan, a neurologist who ruled out neuropathy, radiculopathy, plexopathy, myopathy and pinched nerve(s). He found no neurological explanation for her ongoing complaints.

Claimant was also evaluated by Dr. Lynn A. Curtis, an industrial physician. Dr. Curtis assigned a 16 percent functional impairment to the body as a whole. But this rating is apparently based solely upon a subjective demonstration of diminished grip strength and Dr. Curtis did not review all of the relative medical records.

The ALJ noted the confusing state of the medical evidence on the issue of causation given the claimant's presentation of the facts surrounding her work activities and resulting physical complaints. He stated:

The court finds the record to be obfuscated in regard to many of the basic issues of the case. The cloudiness of the record is summarized by Dr. Miskew, the court's independent medical examiner,<sup>8</sup> in his report of August 30, 2000 the doctor noted:

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<sup>6</sup> Claimant has continued to complain of lower extremity pain but no physician has concluded these complaints bear any relationship to her work activities. Indeed, Dr. Zimmerman specifically stated such complaints were not work related.

<sup>7</sup> Ketchum Depo. at 15.

<sup>8</sup> Dr. Miskew was ordered on May 23, 2000, to perform an independent medical examination pursuant to K.S.A. 44-510e(a).

After today's examination and review of the chart I find it difficult to allot an impairment rating to Ms. Pham. There is no real definite history of injury precipitating these problems. She has not responded in any way to the surgeries that were performed and has not changed her overall symptomatology. She has multiple complaints of musculoskeletal [sic] problems. At present her main problem appears to be related to her cervical spine. She has diffuse tenderness above the elbow but not specifically confined to the lateral epicondyles. She does not have pain on forced dorsiflexion of the wrists. She has negative Phalens' and Tinel's signs to suggest the presence of carpal tunnel syndrome. She has no numbness of the right hand. The numbness of the left hand is more diffuse with other neurological problems, not carpal tunnel syndrome.<sup>9</sup>

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>10</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>11</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>12</sup> The existence, nature and extent of the disability of an injured workman is a question of fact.<sup>13</sup> The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.<sup>14</sup>

In this instance, the ALJ was not persuaded that claimant had met her burden of proof with respect to all aspects of her claim. He concluded she failed to prove it was more probably true than not that her diffuse and amorphous complaints of pain in her right upper extremity, neck and shoulder were related to her work for respondent. As for the left elbow complaints, he found she suffered an accidental injury to that area on July 20, 1998, the date she reported it to respondent. He then issued an Award based upon Dr. Melhorn's

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<sup>9</sup> Award at 2-3.

<sup>10</sup> K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App.2d 277, 278-79, 826 P.2d 520 (1991); see also K.S.A. 44-508(g).

<sup>11</sup> K.S.A. 44-501(a); see *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 245, 689 P.2d 871 (1984).

<sup>12</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 302, 303 P.2d 197 (1956).

<sup>13</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 756, 907 P.2d 923 (1995); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976).

<sup>14</sup> *Carter v. Koch Engineering*, 12 Kan. App.2d 74, 76, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

original assessment of 9.45 percent permanent partial impairment to the left upper extremity.

After a complete review of the rather voluminous record, the Board finds these conclusions reasonable under these facts and circumstances and finds no reason to disturb the ALJ's Award in this respect. As did the ALJ, the Board finds no credible evidence within the record that claimant's symptoms in her right upper extremity occurred simultaneously with those in her left upper extremity. Nor is there any evidence that the light duty work activities she performed after July 20, 1998, and up to April 1999, when she reported pain in her right elbow was the result of her light-duty positions, particularly that of "belt watching," a job that merely required her to stand and watch a conveyor belt. Absent some causative link between her work activities and her physical complaints to her right upper extremity or any of the other physical complaints she has articulated, there is no basis for further recovery. Likewise, there is no basis for awarding a whole body impairment or a work disability.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 30, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this 31st day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Anne Haught, Acting Workers Compensation Director